In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No. 329

M. P. MULLANEY, Commissioner of Taxation of the Territory of Alaska,
Petitioner,

vs.

OSCAR ANDERSON and ALASKA FISHERMEN'S UNION,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Attorney General of Alaska on behalf of M. P. Mullaney, Commissioner of Taxation of the Territory

of Alaska, prays that a writ of certiorari issue to review the judgment entered in this case on June 25, 1951, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

The opinion of the district court is reported at 91 F. Supp. 907. The opinion of the court of appeals, as yet unreported, will be found at R. 162.

JURISDICTION.

The judgment of the court of appeals was entered on June 25, 1951 (R. 196). The jurisdiction of this Court is invoked under Section 1254 of the new Federal Judicial Code.

QUESTION PRESENTED.

Whether the Territory of Alaska has the power to impose on nonresident fishermen a $50 license tax when resident fishermen are required to pay $5.

STATUTES INVOLVED.

The pertinent portions of the statutes involved are set out in the Appendix, *infra*, pp. i-iii.

STATEMENT.

Chapter 66, Session Laws of Alaska 1949 (enacted March 21, 1949), requires all commercial fishermen who take fish from the fishery resources of Alaska to obtain an annual license from the territorial Tax Commissioner. For such license the fee charged a nonresident fisherman is $50; that charged a resident is $5. On May 26, 1949 this action, seeking a declaration from the court that Chapter 66 is unconstitutional and invalid insofar as it imposes a higher license fee on nonresidents than on residents and praying for an injunction to restrain the Tax Commissioner from making collection of the nonresident tax, was brought by Oscar Anderson, Secretary-Treasurer of the respondent Union, and the Alaska Fishermen's Union on behalf of some 3200 of its members who are nonresidents and who fish in Alaska each year (R. 2-6).

At the trial in the district court on March 16, 1950 (R. 46) petitioner introduced testimony which showed, among other things, that thousands of nonresident fishermen come to Alaska each year to fish during the relatively short fishing season, that as soon as the fishing season is over they depart from the Territory, that they have no homes or other ties in Alaska, that there have been large scale evasions of payment of the nonresident fishermen's license tax by this class of fishermen, that the difficulties encountered by the Tax Commissioner in collection of the license tax from the nonresidents are nearly insuperable, and that the burden, expense and inconvenience of such collection are substantially greater with respect to the nonresidents

than with respect to the resident fishermen (R. 95-120). No attempt was made by respondents to contradict the testimony from which such findings were made. The district court consequently held that there were sufficient differences between resident and nonresident fishermen to justify the classification in the amount of license fees between the two, sustained the validity of Chapter 66, and ordered that the complaint be dismissed (R. 14-24).

On appeal the court below (with Chief Judge Denman dissenting) reversed the district court, holding (1) that the movement of nonresident fishermen each year into Alaska constitutes interstate commerce (R. 169); (2) that the necessary effect of the imposition of a higher tax on the nonresidents was to discourage, hamper, and burden such commerce (R. 171); (3) that no facts appeared in the record to sustain the discrimination, and moreover, that the existence of the discrimination by itself demonstrated its invalidity and overcame any presumption of validity which might otherwise attach to Chapter 66 (R. 182); (4) that the Territory had no power over taxation different from that possessed by a state, and hence had no greater freedom in burdening commerce between the states and the Territory than it would if Alaska were a state (R. 169, 171-172); and (5) that (for the foregoing reasons) so much of the tax under Chapter 66 as exceeds that charged resident fishermen is void (R. 185). By way of dictum, the court also stated that if it were not for *Haavick v. Alaska Packers' Association*, 263 U.S. 510, it would be obliged to find that

the facts in the record would not be sufficient (under its interpretation of *Toomer v. Witsell*, 334 U.S. 385) to justify the differential in the tax, and that the discrimination would be, therefore, also in violation of the privileges and immunities clause of Article IV, §2, of the federal Constitution (R. 185-186). In argument in the court below, respondents also relied upon the application of Section 41 of the Civil Rights Act (8 USCA §41) to the legislation in question, but the court failed to construe this statute (R. 194).

SPECIFICATIONS OF ERROR TO BE URGED.

The Court of Appeals erred:

1. In holding that Chapter 66, in imposing on nonresident fishermen a higher license fee than that exacted from resident fishermen, constitutes an unconstitutional burden on and discriminates against interstate commerce.

2. In holding that the Territory of Alaska has no more power over taxation than if it were a state, and hence, that the Territory, in enacting tax laws, is limited to the same extent as a state by the commerce clause of Article I, § 8, of the federal Constitution.

3. In failing to recognize—in view of the record of this case—the presumption that Chapter 66 is constitutional, and in failing to require respondents to maintain their burden of proof that the $50 tax is unreasonable, arbitrary or excessive.

4. In holding that if it were not for *Haavick v. Alaska Packers' Association*, 263 U.S. 510, the differential in tax between nonresidents and residents would constitute a violation of the privileges and immunities clause of Article IV, § 2, of the federal Constitution.

5. In failing to construe Section 41 of the Civil Rights Act (8 USCA § 41).

REASONS FOR GRANTING THE WRIT.

1. The decision below, in being based upon the theory that the power of the Territory to tax is in no respect different from that of a state, is in direct conflict with *Haavick v. Alaska Packers' Association*, 263 U.S. 510. In that case a 1919 act of the territorial legislature which imposed a $5 license tax on nonresident fishermen and none on residents was attacked by Haavick, a nonresident fisherman, who was employed by appellee corporation as a seaman on a vessel which engaged in fishing in the Territory. One ground of attack was that the act violated the privileges and immunities clause of Article IV, § 2 of the Constitution of the United States. Faced with this contention, this Court held that the Territory had the same power over taxation as Congress, that it was not in this case concerned with taxation by a state, and, for these reasons, that the license tax did not violate the privileges and immunities clause and that it could "* * * find nothing in the Constitution which *prohibits Congress* from favoring those who have ac-

quired a local residence and upon whose efforts the future development of the Territory must largely depend." (Emphasis supplied). This, then, is a clear and express declaration by this Court that the territorial legislature is not bound by the same limitations in enacting tax laws as is a state.

If then, for the reasons stated in the *Haavick* case *(supra)*, the privileges and immunities clause is no bar to the imposition by the territorial legislature of a higher license tax on nonresident fishermen, it follows that the commerce clause of Article I, § 8 of the Constitution does not prohibit this type of legislation. Congress itself could have done this by direct action, since the commerce clause, conferring as it does exclusive jurisdiction on Congress to regulate commerce among the states, operates as a limitation solely upon the states and is no bar to action by Congress in any event. See *Neild v. District of Columbia*, 110 F. 2d 246, 251 (App. D.C.). Hence, if the commerce clause would constitute no bar to action by Congress, it cannot have the effect of limiting territorial action. It is not a fact then, as the court below has stated, that Congress in granting legislative power to the Territory intended that such power should not exceed that possessed by the states in dealing with commerce (R. 169, 171-172).

Nor is the court below correct in stating that the interstate factor involved here was not involved in the *Haavick* case (R. 181). One of the points relied on by appellants there, as it appears from the official record of the case on page 511, was that "Alaska per-

mits anyone to take salmon for any purpose, but *discriminates between residents and nonresidents in a matter in which commerce alone is involved*" (Emphasis supplied). To this the court replied (p. 515): "None of the points relied upon by appellant is well taken * * *" We submit, therefore, that in view of the decision in the *Haavick* case there was no authority for the court below to hold that the tax imposed on nonresident fishermen under Chapter 66 was an unconstitutional discrimination against interstate commerce.

2. The decision below, insofar as it applies the limitations of the commerce clause to territorial legislation, is also in conflict with *Buscaglia v. Ballester*, 162 F. 2d 805 (1st Cir.), cert. denied 332 U. S. 816. There, in reply to the assertion that the subjection of certain property to the Puerto Rico ad valorem tax law violated the commerce clause, the court held that this clause did not have the effect of limiting territorial action. It is submitted that the reasoning of that court is sound and should be equally applicable where the "territorial action" is that of the legislature of Alaska. Congress has the power under Article IV, § 3, Clause 2 of the Constitution to legislate with respect to territories, and this comprehensive power is not enhanced by the commerce clause of the Constitution. Moreover, since Congress can limit territorial action to any extent it chooses—it having reserved the express power to annul any act of the legislature of the Territory of Alaska (37 Stat. 518, 48 USCA § 90)—the commerce clause cannot have the consequential effect of limiting such territorial action.

3. The decision of the court below is in direct conflict with a decision of the same circuit in *Anderson v. Smith,* 71 F. 2d 493. In that case the appellant, a resident of San Francisco who fished in Alaska, attacked the validity of a territorial license tax which imposed a $25 fee on nonresident fishermen and a $1 fee on residents. This same court then said (p. 494):

> "It is clear then that by section 3 of the Organic Act Congress authorized the territorial Legislature to determine what additional license fees should be paid for the privilege of fishing within the territorial waters of Alaska, *and to discriminate between residents and nonresidents in that regard.* * * *" (Emphasis supplied).

There has been no subsequent action by Congress, of which petitioner is aware, revoking the authority thus granted to the Alaska legislature to discriminate between residents and nonresidents with respect to fishermen's license taxes. The power then still exists, and as pointed out above in Point 2 of this petition, it is not barred or limited by the commerce clause. Consequently, the court below, in attempting to distinguish these two cases on the ground that the problem relating to interstate commerce was not involved in *Anderson v. Smith,* supra, (R. 181), has completely failed to recognize and resolve the real conflict that exists between the two cases.

4. Even if the commerce clause were a limitation on the taxing power of the Territory, the decision of the court below that the $50 nonresident tax unconstitutionally discriminates against interstate commerce is in conflict with applicable decisions of this Court.

Petitioner has clearly demonstrated that the inconvenience, burden and expense in collecting the tax from nonresident fishermen is substantially greater than that imposed upon him in collecting the tax from the residents (R. 95-120). Respondents made no attempt to contradict this showing. Consequently, even though it might originally have been held that on the face of the statute the classification between residents and nonresidents was not based upon a difference having a fair or substantial relation to the object of the act (see *Colgate v. Harvey*, 296 U. S. 404, 424), this could no longer be said to be the case once petitioner had made the showing he did. Under this evidence, a presumption was immediately raised that the legislative scheme of achieving an equitable distribution of the burden of government was constitutional—a presumption which, at least as far as equal protection is concerned, could be overcome only by the most explicit demonstration that the classification was a hostile or oppressive discrimination against the nonresident fishermen. *Madden v. Kentucky*, 309 U. S. 83, 88. But it is not only in cases where equal protection of the laws is involved that this rule of law applies, for the presumption also attaches in cases where acts of state legislatures are alleged to unduly burden interstate commerce. *Davis v. Department of Labor*, 317 U. S. 249, 257. In these latter cases, as well as in the former, the burden is cast upon one who attacks a statute to overcome the presumption of its validity. *Interstate Busses Corporation v. Blodgett*, 276 U. S. 245, 251. Cf. *Norton Company v. Department of Revenue*, 340 U. S. 534.

Here the court below had no basis on which to find that the $50 tax, in actuality, fell with disproportionate economic weight on interstate commerce—in the absence of any showing by respondents that no additional burden was cast upon the Tax Commissioner in collecting the tax from the nonresidents, that such nonresidents do not escape the various taxes imposed by municipalities and school districts in the Territory to which residents are subject, or that nonresidents are subject, to the same extent as residents, to the substantial increased living costs which are so prevalent in the Territory. The record discloses that respondents made no such showing. It is submitted, therefore, that the holding by the court below that "The existence of the discrimination demonstrates the invalidity of the enactment and overcomes any presumption of validity which otherwise might attach to the Act" (R. 182) is clearly at variance with applicable decisions of this Court.

5. The decision below constitutes a grave interference with the legitimate exercise of the power of taxation of the territorial legislature. As the court below pointed out, the fisheries of Alaska are the backbone of the Territory's economy—in fact more than one half of the entire revenue of the Territory comes from this one source (R. 168). Congress, however, gave express recognition to this fact many years ago. In 1912, when Congress established the Organic Act for Alaska, it was provided in Section 3 of that Act that although the Territory should not have the authority to regulate the fisheries, this prohibition "shall not operate to prevent the legislature from

imposing other and additional taxes and licenses." (Act Aug. 24, 1912, c. 387, § 3, 37 Stat. 512, 48 USCA § 24.) In 1916, the Court of Appeals for the Ninth Circuit pointed out in *Alaska Pacific Fisheries v. Territory of Alaska*, 236 Fed. 52, at p. 58, that the business of fishing was the main subject for consideration by Congress in the question of future taxation by the Territory. In the Act of June 6, 1924 Congress reaffirmed its intent in this respect. There, after making comprehensive provisions for the regulation of the fisheries of Alaska, the law stated: "Nothing in Sections 221 to 228 of this title contained, nor any powers conferred by said sections upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by sections 23, 24, 44, 45, and 67 to 90 of this title." (June 6, 1924, c. 272, § 8, 43 Stat. 467, 48 USCA § 228.) Moreover, this Court has held that such power of taxation, with respect to the fisheries, is "express and unlimited * * *", *Alaska Fish Co. v. Smith*, 255 U. S. 44, 49, and an "unlimited power expressly given * * *", *Pacific American Fisheries v. Territory of Alaska*, 269 U. S. 269, 277.

The court below, however, in holding that the territorial legislature has entered into an area in which it had no power to proceed (R. 182), has established a decision which, if not reviewed by this Court, will have the necessary effect of narrowly limiting the territory's acknowledged and unlimited power of taxation, and of hampering and defeating clearly

expressed Congressional objectives. To restrict the amount of tax that can be collected from the nonresident fishermen to the amount charged residents, in the face of the uncontradicted proof that almost insuperable difficulties and substantially increased costs are placed upon the Territory in collecting the tax from the nonresidents, is to gravely curtail the power of the territorial legislature to obtain revenue, from this phase of fisheries, to which it is entitled. We do not believe it should be assumed that such could have been the intent of Congress in legislating for the Territory, in the absence of a review by this Court of the ruling below.

CONCLUSION.

For the reasons stated, this petition for a writ of certiorari should be granted.

Dated, September 5, 1951.

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(Appendix Follows.)

Appendix.

Appendix

Chapter 66, Session Laws of Alaska, 1949.

Section 1. For the purposes of this Act, "fisherman" shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resources of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as an employee or otherwise. The term "fisherman" shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling fish.

Section 2. No person shall become engaged as a fisherman as above defined without first obtaining a license so to do. License fees levied upon fishermen are as follows: Resident fisherman, $5.00; non-resident fisherman, $50.00. Such licenses shall run for one calendar year, and expire on December 31st of each year. For the purposes of this Act, a resident shall be any citizen who has resided in the Territory for 12 months immediately preceding application for such license and shall have been a bona fide inhabitant of Alaska for at least six months during each calendar year thereafter, and who maintains his place of abode in Alaska. A non-resident is a citizen who has not resided in Alaska for the 12 months immediately preceding application for license or who

maintains his principal business or place of abode outside of the Territory. Any person not a citizen of the United States is deemed to be an alien unless he possesses a valid declaration of intention to become such citizen.

* * * * * * * * *

Section 6. * * * (b) Licenses shall be subject to inspection, and shall, upon request by any officer authorized to enforce this Act, be exhibited to him. Failure to procure or exhibit such license as indicated above or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offender shall be subject to a fine not exceeding $500.00 or imprisonment not to exceed six months, or to both such fine and imprisonment.

Section 7. This Act shall not apply to fishing for personal consumption but shall apply only to fishing for commercial purposes; * * *

Section 8. Sections 39-4-1 to 39-4-16, inclusive except 39-4-11, Alaska Compiled Laws Annotated 1949, are hereby repealed.

Section 9. If any provisions of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

Section 10. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved March 21, 1949.

Act Aug. 24, 1912, c. 387, § 3, 37 Stat. 512, 48 USCA § 24.

The authority granted to the legislature by section 23 of this title to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States or to the game, fish, and fur seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to sections 41, 47, 161 to 169, 321 to 325, and 329 of this chapter. This provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses.

Act June 6, 1924, c. 272, § 8, 43 Stat. 467, 48 USCA § 228

Nothing in sections 221 to 228 of this title contained, nor any powers conferred by said sections upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted to the Territorial Legislature of Alaska by sections 23, 24, 44, 45, and 67 to 90 of this title.